BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AUDIAS JUAREZ-CHAVEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
BEACHNER CONSTRUCTION CO., INC.	)	
Respondent	)	Docket No. **1,051,299**
	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 12, 2010 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant and three co-workers were passengers in a company vehicle driven by claimant's supervisor. They had been picked up outside of Chanute, Kansas, and were traveling to a bridge construction job site near Owasso, Oklahoma. The vehicle left the roadway and struck a rock. As a result of the accident the claimant suffered a fractured radius in his left arm.

The respondent denied the compensability of the claim and argued the accident did not arise out of and in the course of employment pursuant to K.S.A. 44-508(f) because claimant was on the way to assume the duties of his employment when the accident occurred. Respondent further argued the claim was barred pursuant to K.S.A. 44-501d(1) because claimant was not wearing a seat belt at the time of the accident.

After the preliminary hearing, the Administrative Law Judge (ALJ) ordered respondent to provide claimant temporary total disability compensation based on an average weekly wage of $380 beginning May 11, 2010, until released or having reached maximum medical improvement.[1]

[1] Although not expressly stated within the ALJ's Order, it is implicit that the ALJ rejected respondent's affirmative defenses based upon K.S.A. 44-501(d)(1) and K.S.A. 44-508(f).

The respondent requested review and argues the accident did not arise out of and in the course of employment pursuant to K.S.A. 44-508(f) because claimant was on the way to assume the duties of his employment when the accident occurred. Respondent further argues the claim is barred pursuant to K.S.A. 44-501d(1) because claimant was not wearing a seat belt at the time of the accident.

Claimant requests the Board to affirm the ALJ's Order. Claimant argues K.S.A. 44-508(f) is not applicable because the accident was the proximate cause of the employer's negligence. In the alternative, claimant argues travel was an integral part of his employment and travel on a public highway was an activity contemplated by his employer, consequently the claim is compensable.

The issues before the Board on this appeal are:

- Whether claimant sustained an accidental injury arising out of his employment with the respondent or is he prevented from receiving workers compensation benefits under the going and coming rule?

- Is this claim barred under K.S.A. 2009 Supp. 44-501(d) for willful failure to use a safety device?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Audias Juarez-Chavez worked for respondent only a short time before he was injured in an automobile accident. Claimant testified that arrangements were made with respondent that he would car pool with his supervisor to the work site in Oklahoma. Claimant drove his vehicle to an agreed location outside of Chanute, Kansas, and his supervisor would pick up claimant as well as some co-workers for the hour and a half to two hour trip to the job site near Owasso, Oklahoma. The supervisor drove respondent's truck.

Claimant testified that when he was hired he agreed to meet at the pick-up location for the ride to the job site because it was otherwise too far for him to drive. Claimant was not paid for traveling to and from the job site. And he also agreed it was for his convenience to ride in the company vehicle so he did not have the expense of driving his car. Don Bond, respondent's safety director, testified that the employees have the option of riding with a foreman or driving by themselves to and from the job site. The foremen are required to drive a company truck to the job site. The employees clock-in after arriving at the job site.

On May 11, 2010, claimant, his supervisor and three co-workers were traveling to the bridge construction job site in the company vehicle driven by his supervisor. Claimant testified that the vehicle was approximately a minute away from the job site when his supervisor took a turn in the road at about 60 miles per hour which was too fast for the wet conditions and the vehicle left the roadway striking a rock. Claimant denied that the supervisor had swerved to avoid hitting a deer. Mr. Bond testified that the supervisor driving the vehicle prepared an accident report and had estimated he was driving 45 miles per hour when the vehicle left the roadway. And Mr. Bond had personally investigated at the accident scene and had noted deer tracks on the side of the road.

The claimant agreed that he was not wearing a seat belt at the time of the accident because he had just taken it off preparatory to leaving the vehicle since they were close to the job site. Claimant testified through an interpreter:

> The, I did have it on but I had taken it off because we were about to arrive to the job site and the boss was very, he was very strict. He wanted us to get off quickly and so that's why I had taken it off.[2]

In response to a question whether respondent had a policy about wearing seatbelts, Mr. Bond responded, "Yes, they do."[3] but offered no further explanation regarding the policy.

Claimant was taken by ambulance to a hospital and diagnosed with a broken arm. A cast was placed on claimant's arm and he was referred to Labette County Medical Center. Claimant was taken off work and had follow-up visits with his doctor on May 20th, May 27th, June 24th, July 13th and August 10, 2010, when he was released to return to work. Claimant testified his employment with respondent had been terminated because he did not have a valid social security number.

The respondent argues that the accident did not arise out of and in the course of employment because claimant was on the way to assume the duties of his employment when the accident occurred.

K.S.A. 2009 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on

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[2] P.H. Trans. at 21.

[3] *Id*. at 28.

> the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[4] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[5]

The "going and coming" rule does not apply if the worker is injured on the employer's premises.[6] Nor is it applicable when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[7]

In this case the accident did not occur on the respondent's premises. Nor was the claimant injured while using the only route available to or from work involving a special risk or hazard. Consequently, the statutory exceptions contained in K.S.A. 2008 Supp. 44-508(f) are not applicable to this fact situation. But the analysis does not end with that determination.

The Kansas appellate courts have also noted that the "going and coming" rule, does not apply when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[8] And it has

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[4] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[5] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[6] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[7] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[8] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___Kan. ___(2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

been held that the "going and coming" rule is inapplicable when the travel is for a special purpose and when employees are paid for their travel time and/or expenses.[9]

In *Messenger*, the Court noted in Syllabus 4:

> In a workers' compensation case, the record is examined, and it is *held*, that where (1) employees are required to travel and to provide their own transportation, (2) the employees are compensated for this travel, and (3) both the employer and employees are benefitted by this arrangement, then such travel is a necessary incident to the employment, and there is a causal relationship between such employment and an accident occurring during such travels; thus, the "going and coming" rule, K.S.A. 1983 Supp. 44-508(f), does not apply, and the trial court correctly awarded compensation.[10]

In *Messenger*, the claimant was killed in a truck accident while on the way home from a distant drilling site. A key factor in *Messenger* was that the employer actively sought persons who were willing to work at "mobile sites". As the respondent was in the practice of paying drillers to drive to far away points, providing an entire crew with transportation was customary.[11] Additionally, testimony in *Messenger* indicated that the company received a definite benefit when hiring crew members who agreed to travel, as the drilling company did not attempt to hire team members who lived near each drilling site, but instead expected the existing crews to travel to the drilling sites. In *Messenger*, the employees were found to have no permanent work site, but were required to travel to distant locations. As that was the common and accepted practice in the oil field business where Messenger was employed, the claimant's death was found to arise out of and in the course of his employment.

In *Kindel*,[12] the Kansas Supreme Court approved the *Messenger* decision and stated:

> Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding "going and coming" rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because Kindel and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from

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[9] *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, Syl. ¶ 5, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435.

[11] *Id.* at 439.

[12] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.[13]

In a more recent decision, the Kansas Court of Appeals in *Brobst*[14] reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

> . . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.
>
> Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act.[15] (Citations omitted.)

This claim has certain similarities to the *Messenger* and the *Kindel* decisions where it was determined that travel was an integral part of the job where travel to and from a remote site was in a company vehicle driven by a supervisor. Here the respondent required the supervisor to drive some distance to the job site and provide co-workers with transportation. Based on Mr. Bond's testimony this practice was customary and although some workers did drive to the job, the majority of the workers were provided transportation.[16] And as in *Messenger* there in a mutual benefit from this arrangement. And the fact claimant did not incur the expense of the travel is akin to being compensated for such travel. This Board Member concludes that the trip to the job site was an integral part of claimant's job and his injury arose out of and in the course of his employment with respondent. Therefore, the accident is compensable under the Workers Compensation Act.

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[13] *Kindel* at 277.

[14] *Brobst v. Brighton Place North,* 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[15] Brobst at 773 and 774.

[16] P.H. Trans. at 28.

Respondent argues that as a consequence of the recent *Bergstrom*,[17] decision the only exceptions to the "going and coming" rule are the two specific exceptions enumerated in K.S.A. 2008 Supp. 44-508(f). In *Bergstrom*,[18] the Kansas Supreme Court recently held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

The court further held:

> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.[19]

Respondent further argues that the inherent travel and special purpose exceptions to the "going and coming" rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

This Board Member disagrees. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule" was not applicable because the workers in those cases were in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* where it was stated in pertinent part:

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of employment." K.S.A. 4-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks

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[17] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

[18] *Id*.

[19] *Id.*, Syl. ¶ 2.

> of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.[20]

Moreover, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f) nor overruled any cases that have interpreted that statute and is factually distinguishable.

Respondent next argues the claim is barred because claimant was not wearing a seat belt at the time of the accident.

K.S.A. 2009 Supp. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[21] and the Court of Appeals in a much more recent decision in *Carter*[22] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[23]

In this instance there is the admission that claimant was not wearing his seat belt when the accident occurred. Claimant testified that he had worn his seat belt during the trip but because they were close to the job site he had taken it off in order to quickly exit the vehicle at the job site. Claimant's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate.

Moreover, the foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

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[20] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

[21] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[22] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[23] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The administrative regulation promulgated to implement the requirements of K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation. Mr. Bond testified that there was a policy regarding seat belts but there was simply no testimony provided regarding that policy. Likewise, there was no testimony that there were repercussions for failure to use a seat belt. This Board Member concludes that, under the facts of this case and based upon the evidence compiled to date, the failure to use a seat belt cannot be utilized as a defense to the claim.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[24] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[25]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated August 12, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of October 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Mel L. Gregory, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[24] K.S.A. 44-534a.

[25] K.S.A. 2009 Supp. 44-555c(k).